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The Mechanics of an Examination Before Trial

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THE MECHANICS OF AN EXAMINATION BEFORE TRIAL

THE Court of Appeals, cognizant of the confusion arising from the indiscriminate use of the terms "presumption" and "inference" especially as they applied to the procedural effect of the application of the rule of *res ipsa loquitur,* has written an elaborate opinion,[1] resolving all doubt in the matter.

The writer, cognizant of the confusion arising from the indiscriminate use of the terms "deposition" and "examination before trial" as applied to a party and to a witness and as applied to the procedural effect of the use or purpose for which the examination is sought is motivated to present this article.

The purpose of this article is not to discuss the contents or the form of a notice, affidavit or order in support of a deposition or an examination before trial but rather to call to the attention of the bar certain distinctions and after the distinctions are thoroughly understood to attempt to clarify the procedure only insofar as it may apply to an examination of a party or witness for the purpose of using an adverse party's testimony as part of the moving party's prima facie case. We must keep in mind the distinction between an examination before trial or deposition in order to obtain facts necessary as proof for the moving party's prima facie case and an examination before trial or deposition to perpetuate testimony. Decisions as to the former are not necessarily as authoritative as to the rights of the latter. Both examinations are sometimes referred to as examinations before trial and both examinations are sometimes referred to as depositions as both are taken down in writing and read as evidence upon the trial. We must therefore keep in mind the distinction between an examination before trial or deposition as each may refer to the purpose of the examination.

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[1] Foltis v. City of New York, 287 N. Y. 108, 38 N. E. 2d 455 (1941).

WHO MUST RECEIVE NOTICE OF THE EXAMINATION AND WHAT PARTY OR PARTIES ARE BOUND BY SUCH EXAMINATION?

A deposition or an examination before trial must be upon reasonable notice by a party to his adversary or if such adversary is appearing by attorney to such attorney [2] or if proceeding by order in the first instance in lieu of notice upon notice to the other parties who have appeared or answered.[3]

A notice served pursuant to Section 290 of the Civil Practice Act may be had upon notice to the attorneys who have appeared in the action.[4] For failure to appear, the court is not justified in striking out the pleading and although the party is deemed wilfully in default, he is not answerable to punishment for contempt, but further proceedings in the action by party defaulting will be stayed until he has complied with the notice.[5]

When a motion is made to vacate or modify a notice served under Section 290 the same rule and burden of proof governs as exists upon an application under Section 292.[6]

In *Solomitz v. Steinberg* [7] the court denied a motion for examination before trial upon the ground that notice of motion for the examination was not served upon a co-defendant as required by Section 292 of the Civil Practice Act. Failure to give such notice may be waived.[8] The reasoning behind this requirement to give notice is stated in *Nixon v. Beacon Transportation Corp.*, where the court held that reading of the deposition of a defendant as against a co-defendant because of failure to give notice constituted reversible error:

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[2] N. Y. CIV. PRAC. ACT § 290.

[3] N. Y. CIV. PRAC. ACT § 292.

[4] Nederlansche v. Interocean Oil Co., 208 App. Div. 107, 203 N. Y. Supp. 45 (1st Dep't 1924).

[5] Bloch v. Guaranty Trust Co., 119 Misc. 832, 198 N. Y. Supp. 305 (Sup. Ct. 1922); Island Supply v. Steitz, 127 Misc. 598, 217 N. Y. Supp. 154 (Sup. Ct. 1926).

[6] N. Y. RULES CIV. PRAC. § 122; Lovasz v. Fowler, 209 App. Div. 169, 204 N. Y. Supp. 13 (2d Dep't 1924); Kahn v. Brooklyn Edison, 228 App. Div. 668, 238 N. Y. Supp. 305 (2d Dep't 1929); Newman v. Fischer, 249 App. Div. 637, 291 N. Y. Supp. 80 (2d Dep't 1936); Abels v. Rubin, 145 Misc. 806, 261 N. Y. Supp. 85 (County Ct. 1932).

[7] 225 App. Div. 851, 233 N. Y. Supp. 897 (1st Dep't 1929).

[8] Brooklyn National Bank v. Village of Rockville Centre, 243 App. Div. 775, 277 N. Y. Supp. 770 (2d Dep't 1935); Simpson v. Johnson, Drake & Piper, Inc., 249 App. Div. 827, 292 N. Y. Supp. 84 (2d Dep't 1937).

In our opinion the reading of the deposition of defendant Wilson as against the other defendant, appellant, resulted in the admission of incompetent evidence, constituting error. The provisions of sections 288, 290, 303 and 304 of the Civil Practice Act relate to two entirely different subjects: One. The examination of a party where his deposition may be read on the trial against him as being an admission against interest, as though he had made the same admission in his pleading. Such parts may be read as are deemed pertinent by the party taking the deposition, and he is not bound to read portions thereof unfavorable to him. The party examined does not become a general witness on all the facts where there are other parties defendant. Two. Witnesses who are not parties may be examined under certain prescribed conditions. Their testimony is evidence on the facts in issue if otherwise competent, for or against either party. Their depositions may be read on the trial only under the conditions specified in section 304. The sections contemplate the appearance of witnesses in court for examination and cross-examination in the presence of court and jury unless there is some substantial reason which prevents such attendance. As to his co-defendant, defendant Wilson was a witness. His admissions whether made in a pleading or on examination, were not binding on defendant Beacon Transportation Corporation. If plaintiffs desired to take the evidence of Wilson as a witness against his co-defendant, the latter was entitled to plain notice to that effect. The notice that plaintiffs were to take the deposition of Wilson as a party was not sufficient. The statute does not contemplate the rule applied in this case. It would open the door to collusion and fraud. Judgments entered in favor of defendant Wilson reversed on the law and a new trial granted, costs to abide the event. This defendant profited by the error above discussed. By the admission of his deposition he was permitted to cast all blame upon his co-defendant, and then withdraw from the case without testifying on the witness stand and without being subjected to cross-examination. When he withdrew it prevented any evidence offered by the co-defendant from affecting his liability. The interests of justice require that he should testify on the new trial in the light of his personal liability.[9]

In *Kozuch v. Bachman*[10] the court held that if the testimony of the defendant sought to be examined is required as a witness against the defendants who have answered there

[9] 239 App. Div. 830, 831, 264 N. Y. Supp. 114, 116 (2d Dep't 1933).
[10] 244 App. Div. 250, 278 N. Y. Supp. 950 (1st Dep't 1935).

must be a compliance with these other provisions of Section 288 of the Civil Practice Act which relate to the taking of the deposition of a witness not a party to the action for use upon the trial. What these other provisions are may be found in the *Matter of Rubin* [11] and *McGowan v. Eastman.*[11a] *Nixon v. Beacon Transportation Co.*[12] was subsequently construed by the Second Department in *Freisinger v. Reibach,* wherein the court stated:

> Order on an examination before trial of an individual defendant on behalf of the plaintiffs on notice to the appealing co-defendants, denying those co-defendants the right to cross-examine the individual co-defendant being examined on motion of the respondents, reversed on the law, . . . and the motion granted to the end that such examination may be had; the examination to be had on five days' notice. *Nixon v. Beacon Transportation Corporation* . . . merely held that the examination of a defendant on behalf of a plaintiff on notice to the co-defendants, did not require the co-defendants to appear and participate in the examination; that in such event the deposition thus taken was not binding on those co-defendants. That decision contemplated that the co-defendants might, if they saw fit, appear upon receiving notice, participate in the examination and be bound. Sustaining the latter practice furthers the ascertainment of the truth and facilitates the determination of the issues in the litigation.[13]

Where there is presented a situation where the examination is not sought by the plaintiff in good faith and there is presented merely a proposed attempt on the part of plaintiffs to cross-examine defendant on matters relating to an affirmative defense the examination will be denied in the exercise of sound discretion.[14]

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[11] 161 Misc. 374, 376, 292 N. Y. Supp. 306, 307 (Surr. Ct. 1936).
[11a] 271 N. Y. 195, 198, 2 N. E. 2d 625, 626 (1936).
[12] 239 App. Div. 830, 264 N. Y. Supp. 114 (2d Dep't 1933).
[13] 254 App. Div. 575, 2 N. Y. S. 2d 817 (2d Dep't 1938).
[14] Soiefer Farms, Inc. v. Quincy Mutual Fire Ins. Co., 254 App. Div. 768, 4 N. Y. S. 2d 578 (2d Dep't 1938).

What Rulings the Court May Make as to the Competency or Admissibility of Evidence and its Relevance

Much time is given by the courts in settling disputes overruling or sustaining objections to questions asked a party or a witness on an examination before trial. The court in *Guenther v. Ridgeway Co.* [15] held that in an examination before trial whether the examination is had before the court or referee, such examination merely conferred authority to determine whether questions are relevant, and whether the witness is bound to answer, which evidently is intended to provide for cases in which the witness would be privileged from testifying, and it is not for the court or justice supervising the examination to pass upon the strict competency and materiality of the evidence.

In the case of *Harrison v. Miller* the court states:

> It is not the proper practice to enter an order overruling or sustaining objections to questions asked a witness. The ruling and an exception thereto should be noted.[16]

The proper time to raise the objection that the witness is privileged from testifying is at the time of the examination.[17]

When and How a Party or Witness May be Sworn and the Right of the Party or Witness Examined to Correct Answers

In the case of *Broome County Farmers Fire Relief Association v. The New York State Electric, etc.,* testimony was taken by deposition on the ground that because of illness of the party to be examined it appeared reasonably certain that he would be unable to attend the trial of the action. Shortly

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[15] 159 App. Div. 74, 143 N. Y. Supp. 861 (1st Dep't 1913); *accord,* Brown v. Bedell, 232 App. Div. 158, 249 N. Y. Supp. 277 (1st Dep't 1931); Anton v. Viola, 235 App. Div. 816, 256 N. Y. Supp. 991 (2d Dep't 1932); Kearns Coal Corp. v. U. S. F. & G. Co., 118 F. 2d 33 (C. C. A. 2d 1941).

[16] 190 App. Div. 184, 185, 179 N. Y. Supp. 331, 332 (1st Dep't 1919); *accord,* Durkin v. Wickwire Spencer Steel Corp., 220 App. Div. 741, 221 N. Y. Supp. 816 (2d Dep't 1927).

[17] Ely v. Perkins, 127 App. Div. 823, 112 N. Y. Supp. 122 (4th Dep't 1908).

after taking the deposition and before the stenographer's minutes were transcribed the witness died. Special term ordered that the deposition be suppressed solely on the ground that it had not been read over and subscribed by the witness in accordance with Rule 129 of the Rules of Civil Practice. It was undisputed that the testimony was accurately taken and correctly transcribed. The appellate court held that a deposition will not be suppressed solely on the ground that it had not been read over and subscribed by the witness in accordance with Rule 129 of the Rules of Civil Practice, where after testimony had been accurately taken by a court stenographer the witness died before the minutes were transcribed. It must be noted in the case just cited that the testimony was taken by a court stenographer, and that it was undisputed that it was accurately taken and correctly transcribed and that the sole objection to its use was that it had not been read over and subscribed, the court stating:

In the case at bar failure to have the deposition read over and subscribed by witness is merely an irregularity.[18]

The approved manner or method of swearing a witness is clearly set forth in *Columbia v. Lee.* In view of its brevity the opinion is quoted *in toto:*

The proper practice to pursue is that indicated in Re: *Samuels* (C. C. A.) 213 Fed. 447. Such a practice keeps the amount of friction and conflict at a minimum. Before the witness signs and subscribes his testimony, he may add to the foot thereof a statement that certain of his answers (indicating the answers to which he refers), are incorrect, giving the reason therefor either that it is incorrectly transcribed or that his present recollection of the facts is more accurate and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer. After adding such a statement he must sign and subscribe his testimony. This will leave available to the trial court the original form of answer which may then be compared with the second form of answer to determine which one may or should be credited. This will also make known before the trial whether there is any need to have the transcript authenticated as to its accuracy by the stenog-

[18] 239 App. Div. 304, 268 N. Y. Supp. 131 (3d Dep't 1933).

rapher. This procedure gives to the plaintiff every practical benefit that would accrue to him by a literal following of the practice indicated in *Van Son v. Herbst,* 215 App. Div. 563, 214 N. Y. Supp. 272, which concerned a case where a witness was denied an opportunity to in any form make corrections to the transcript of his testimony when he was called upon to sign it.[19]

The procedure as outlined above should be followed. It happens many times that words stricken out in answers or interlineations or additions made are repudiated on the trial. This may cause unnecessary comment or criticism by either side, giving rise to questioning the correctness or authenticity of the examination and creating a bad impression especially before a jury.[20]

When, If at All, a Party or a Witness Whose Examination is Taken May be Cross-examined

One of the most important questions to discuss under this heading is whether a defendant, to put it plainly, has the right of cross-examining himself if he appears without an attorney, or if he can be cross-examined by his own counsel when so appearing when his testimony is taken as an adverse party. Under such circumstances a plaintiff may not cross-examine a defendant.[21] In *Birnbaum v. Equitable Life,* Judge Fawcett stated:

> Motions for examination before trial denied without prejudice to renewal upon papers showing the items therefor in proper affirmative form . . . so as to preclude the cross-examination of defendant which is possible under the items as now stated.[22]

Such is the reason given by the court in *Balsum v. Finkelstein,* in condemning the use of the words "if," "whether" and "whether or not":

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[19] 239 App. Div. 849, 264 N. Y. Supp. 423 (2d Dep't 1933).

[20] *See* Mansbach v. Klausner, 179 Misc. 952, 40 N. Y. S. 2d 647 (Sup. Ct. 1943). That you have the right to compel a party to sign testimony taken on examination before trial within the state, see the opinion of Hammer, J., in Hachtmann v. N. Y. Post, 117 N. Y. L. J. 1877 (Sup. Ct. May 13, 1947).

[21] Soiefer Farms, Inc. v. Quincy Mutual Fire Ins. Co., 254 App. Div. 768, 4 N. Y. S. 2d 578 (2d Dep't 1938).

[22] Birnbaum v. Equitable Life Assurance Soc., 257 App. Div. 836, 12 N. Y. S. 2d 15 (2d Dep't 1939).

To permit defendants to examine on that part of the item would be to allow the cross-examination of plaintiff in advance of the trial, a practice which is forbidden.

A party seeking an examination should word each item in such a way as to show definitely that the questioning to take place will be a search for evidence to prove a fact material and necessary in the prosecution or defense of an action, the burden of establishing which fact rests upon him and concerning which the pleadings have raised an issue. That rule is violated when an item starts with "if," "whether" or "whether or not." An item in any question form permits an examination on the affirmative as well as the negative side of an issue. Evidence on both sides of an issue raised by the pleadings can never be "material and necessary in the prosecution" as anticipated by section 288 of the Civil Practice Act, of a cause of action or a defense. It may be interesting, and even of value to the party, but it cannot properly be the subject of pretrial questioning.

Items should be declaratory in form. They should indicate that the deposition is desired for the purpose of showing, proving or establishing that the identical state of facts as pleaded by the party seeking the examination is the state of facts.[23]

In passing it should be noted that the Appellate Division, Second Department, in *Groff v. Daily Review,* states: "The introduction of each item with the word 'whether' is not objectionable." [24] This case however does not hold that the party examined may cross-examine himself or be cross-examined by his attorney. The Appellate Division in the same department has outlined the proper procedure, which gives the necessary protection to the party whose examination is taken.[25]

The defendant may not cross-examine the plaintiff in advance of the trial as to matters which are clearly part of the plaintiff's case.[26] A defendant may not examine a co-defendant before trial as a witness nor on matters on which the plaintiff has the burden of proof nor may he examine the

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[23] 164 Misc. 873, 875, 299 N. Y. Supp. 649, 652 (Sup. Ct. 1937).
[24] 248 App. Div. 773, 774, 289 N. Y. Supp. 46, 47 (2d Dep't 1936).
[25] Columbia v. Lee, 239 App. Div. 849, 264 N. Y. Supp. 423 (2d Dep't 1933). *See* Klein v. Sophkush, 99 N. Y. L. J. 1222 (Sup. Ct. March 12, 1938).
[26] O'Boyle v. Home Ins. Co., 226 App. Div. 767, 234 N. Y. Supp. 259 (2d Dep't 1929).

latter as an adverse party upon matters of defense unnecessarily pleaded.[27]

In the case last cited is to be found the following significant statement:

> There is no issue between the defendants herein. The issues to be disposed of at the trial are between the plaintiff and the defendants. The defendant appellant, Bedell, is not seeking a judgment against the other defendants.[28]

The language may be considered to mean that a defendant may secure the examination before trial of a co-defendant or defendants where such defendant is seeking a judgment against the other defendant or defendants.

The reasoning is clearly propounded in an opinion of Mr. Justice Eder, granting the examination of defendants Rubin by defendant Hearn wherein he states:

> The cross complaint contained in the answer of the defendant Hearn alleges a complete cause of action; under it there are rights to be determined in the present case between the defendant Hearn and the defendants Rubin; the defendant Hearn makes a claim against the defendants Rubin; it asserts a right of recovery; it sets up a cause of action; it states a grievance against said defendants Rubin; there are issues between them; they are adverse parties; defendant Hearn is prosecuting a cause of action against the defendants Rubin.[29]

It has been shown that plaintiff may not cross-examine a defendant, a defendant may not cross-examine a plaintiff nor may a defendant cross-examine a co-defendant as an adverse party except as above stated.

Yet several special term decisions have been written, one recently, holding that a defendant, where an examination is being held of the defendant, for the purpose of obtaining proof necessary and material in the prosecution of the action, has the right to cross-examine himself. The reason given is that such an examination under Section 288 of the Civil Practice Act presupposes an opportunity of cross-examination.

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[27] Brown v. Bedell, 234 App. Div. 90, 254 N. Y. Supp. 215 (1st Dep't 1931).

[28] *Id.* at 93.

[29] Parodis v. Hearn Department Stores, Inc., 178 Misc. 191, 194, 33 N. Y. S. 2d 553, 556 (Sup. Ct. 1942).

The authorities cited for the conclusion drawn are the cases of *Schupp & Sons, Inc. v. Barnett,*[30] *Nixon v. Beacon Transportation Corp.*[31] and *National Fire Ins. Co. v. Sherman.*[32] A casual reading of these cases will show that they propound no such theory or doctrine.

The case of *Nixon v. Beacon Transportation Corp.* quoted in full in this article under the heading "Who Must Receive Notice of the Examination and What Party or Parties are Bound by Such Examination" refers to the reading on the trial of the deposition of a defendant as against a co-defendant; and holds that on the deposition so taken, such defendant was a witness against his co-defendant and therefore such co-defendant was entitled to notice to the effect that the party examining such defendant desired to take such evidence of defendant as a witness against the co-defendant and that notice that plaintiffs were to take the deposition of defendant as a party was not sufficient.

Nowhere in the *Nixon* case is it held or even intimated that a defendant may cross-examine himself or be cross-examined by his lawyer when the examination of such defendant is held for the purpose of obtaining facts necessary and material for the moving party's case. What the Appellate Division had in mind is construed in *Freisinger v. Reibach* and shows conclusively that the court was writing about the right of a co-defendant to cross-examine a defendant whose examination is sought by the plaintiff. Reading the second sentence in the opinion in the *Schupp* case will show, as the court stated, the following fact:

> This deposition was taken . . . "under stipulation entered into between the attorneys for the respective parties so that the same may be read in evidence on the trial of this action."

When the court in the *Schupp* case at page 547 uses the following language:

> It is common practice to permit a party to read such parts of a deposition as he may choose to read and his adverse party may read the remainder if he cares to do so,

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[30] 210 App. Div. 546, 206 N. Y. Supp. 553 (3d Dep't 1924).
[31] 239 App. Div. 830, 264 N. Y. Supp. 114 (2d Dep't 1933).
[32] 223 App. Div. 127, 227 N. Y. Supp. 522 (4th Dep't 1928).

it did not refer to the right of cross-examination at the time the original examination was held but the rights of each party to read portions of the examination on the trial considering the purpose for which the original examination was held.

The case of *National Fire Insurance v. Sherman* is not authority for the proposition that defendant may cross-examine himself when he is being examined as a party, by the plaintiff, in order that plaintiff may obtain proof for his prima facie case.

In that case the defendant was examined before trial by the plaintiff contained in two separate depositions. The plaintiff on the trial read part of both depositions or examinations and the depositions or examinations were not marked in evidence. The court held: First: That the plaintiff reading from the examinations could not be compelled to read from them anything other than such selected admissions, and that the court overruling defendant's objections to plaintiff's refusal to read other than such selected admissions is sustained by authority. Second: That those parts of the depositions or examinations already before the jury were introduced upon the theory that they constitute admissions of defendant against his own interest; defendant was entitled to have anything further therein read that might be material to the issue, this of course subject to objections as to its competency. Third: The fact that the defendant was not then in court, his presence or absence had no bearing on the right to read the omitted parts of these depositions or examinations. The reason for the last point decided is stated by the court:

> He was a party to the action and section 304 of the Civil Practice Act expressly exempts depositions of the parties from the limitations imposed on the reading of depositions of the witnesses taken within the state.[33]

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[33] National Fire Insurance v. Sherman, 223 App. Div. 127, 227 N. Y. Supp. 522 (4th Dep't 1928); *see* General Ceramics Co. v. Schenley Products Co., Inc., 262 App. Div. 528, 30 N. Y. S. 2d 540 (1st Dep't 1941); Goell v. United States Life Ins. Co., 265 App. Div. 735, 737, 40 N. Y. S. 2d 779, 780 (1st Dep't 1943).

From these three propositions of law decided in the last cited case it follows logically that the moving party in such an examination taken for the purpose of obtaining proof in aid of the moving party's prima facie case may not be compelled to read from such examination during the trial if the party taking the examination so elects not to read any portion.[34]

It can be seen that the *National Fire Insurance Co.* case not only does not hold that a defendant examined before trial at the instance of plaintiff may cross-examine himself or be cross-examined, but on the contrary distinctly states and reiterates the distinction between the examination of a party and a witness, and clearly holds that introducing parts of testimony of a defendant as a party is upon the theory that such parts constituted admissions of defendant against his own interest.

The distinction between an examination of a party to use the proof or evidence obtained as part of the moving party's prima facie case or to frame a pleading, and the taking of testimony of a party or witness because of the inability of a party or witness to attend at the trial is easily seen from the difference in the requirements of the contents of the affidavits in support of the motion and the order upon which the examination or deposition is held.[35]

If the *Schupp* and *National Fire Ins. Co.* cases were authority for the proposition that a defendant could cross-examine himself during a deposition or examination deemed

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[34] *See* Bambauer v. Schleider, 176 App. Div. 562, 163 N. Y. Supp. 186 (2d Dep't 1917).

[35] Zeldman v. Electrolux, Inc., 161 Misc. 849, 292 N. Y. Supp. 116 (Mun. Ct. 1936); Nixon v. Beacon Transportation Corp., 239 App. Div. 830, 264 N. Y. Supp. 114 (2d Dep't 1933); McGowan v. Eastman, 271 N. Y. 195, 2 N. E. 2d 625 (1936); Kozuch v. Bachmann, 244 App. Div. 250, 278 N. Y. Supp. 950 (1st Dep't 1935); Freisinger v. Reibach, 254 App. Div. 575, 2 N. Y. S. 2d 817 (2d Dep't 1938); Kornbluth v. Isaacs, 149 App. Div. 108, 133 N. Y. Supp. 737 (1st Dep't 1912); Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 N. Y. Supp. 865 (1st Dep't 1907); Mitchell v. Central Mines, 124 App. Div. 325, 108 N. Y. Supp. 953 (1st Dep't 1908); Segechneider v. Waring Hat, 134 App. Div. 217, 118 N. Y. Supp. 1000 (2d Dep't 1909); O'Connor v. O'Connor, 186 App. Div. 959, 172 N. Y. Supp. 909 (2d Dep't 1918); Spurr & Sons, Inc. v. Empire State Surety Co., 122 App. Div. 449, 106 N. Y. Supp. 1009 (2d Dep't 1907); Matter of City Bank, 205 App. Div. 513, 199 N. Y. Supp. 698 (1st Dep't 1923); Buhl v. Collins, 223 App. Div. 850, 228 N. Y. Supp. 379 (2d Dep't 1928).

necessary and material for the moving party's prima facie case, this could and would be the result. The defendant is examined by plaintiff for the purpose of eliciting testimony deemed necessary and material to plaintiff's prima facie case; defendant is allowed to cross-examine himself by himself or by his lawyer, we will say upon the excuse of clearing up dubious inferences or making alleged warranted explanations of answers he may have given or because the court may hold such examination pre-supposes the right of cross-examination.

Now we come to the trial. The plaintiff has read into evidence certain portions of the examination before trial he deems necessary as part of his prima facie case or he deems necessary as constituting admissions of defendant against his own interest. The defendant may then read into the record on his defense such cross-examination of himself, by himself or his attorney as he may choose, and rest without taking the stand. The plaintiff then would be deprived of his right to cross-examine the defendant on the trial and having no such right on the examination before trial, the very purpose of the statute, to wit, to aid the plaintiff, would become a sword in the hands of the defendant. The defendant therefore would be given an opportunity to perpetuate his testimony and by his cross-examination of himself be permitted to cast all blame on the plaintiff and disappear from the case without testifying on the witness stand.

When and in What Manner the Examination or Deposition so Taken May be Read at the Trial and What Party or Parties are Bound by Such Examination

Reading the cases cited above under the various headings it would appear that the proper practice where a deposition or an examination before trial is to be taken is: First: That the moving party determine the purpose for which the examination is sought. Second: That he should distinguish whether such examination is of a party or a witness and who is entitled to notice. The purpose for which the examination is sought, who has received notice, and whether the exam-

ination is of a party or witness will determine the right of cross-examination. The right to read part or all of the examination or deposition at the trial will depend upon the purpose for which it was taken, and regardless of the purpose, however, if any portion of the examination or deposition is read into the record by the party who has taken the examination, the opposite side has the right to read any portion in his own behalf as part of his case unless such part sought to be read has been excluded as incompetent or for some other similar reason.

The better practice on the trial would appear to be to mark the deposition or examination for identification, have the record show that it is the deposition or examination of a party or a witness giving the name, the date and that it was taken pursuant to an order or stipulation which is marked in evidence or obtain a concession showing the type of character of the examination so that the court may properly rule on any motion or objection. After the deposition or examination is marked for identification and the purpose for which the examination or deposition was taken is disclosed, the proper procedure would be to read each question and answer separately so the court may again properly rule on any motion or objection to each question and answer so that the rights of each party may be properly protected. To mark the whole examination or deposition into evidence would preclude either party from objecting to any question and answer as to competency, relevancy or materiality. To mark the whole examination or deposition into evidence would make portions of it which the party offering it would not otherwise concede part of his affirmative case.[36]

In *Kramer v. Kramer* the plaintiff's deposition was taken at the instance of the defendant prior to the trial.

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[36] *In re* Van Ness Will, 78 Misc. 592, 613, 139 N. Y. Supp. 485, 502 (Surr. Ct. 1912), wherein the court states: "The party who reads any portion of such deposition makes it a part of that party's own direct evidence, but he is not estopped to object on the trial to his own questions so put to the witness as irrelevant or incompetent"; Kalkhoff v. Russian Orthodox, etc., 67 Misc. 107, 121 N. Y. Supp. 713 (Sup. Ct. 1910), the court stating: "In the case at Bar defendant might have objected to such questions or answers as he considered incompetent or irrelevant, or perhaps even as impeaching the witness' testimony on the direct examination."

The answer of the defendant among other things denied that there was any consideration for the note in suit. The defendant read certain portions of the deposition after the plaintiff had rested. The plaintiff, in rebuttal, called no witnesses but sought to read portions of the deposition which had been omitted by the defendant and which questions were objected to on various grounds. The Appellate Division held that an objection to the relevancy or substantial competency of a question put or answer given may be made as if the witness were then personally examined and stated:

and the fact that a party at whose instance it was taken reads a portion of the testimony given which is material and competent, as bearing upon the issue, does not permit the opposing party to read the portions omitted, if they are incompetent and duly objected to. This was distinctly held in *Wanamaker v. Niegraw,* 168 N. Y. 125, 61 N. E. 112, where the Court of Appeals said:

"The party who has caused a deposition to be given on his behalf does not necessarily, by offering and reading parts of it in evidence, bind himself to read it all, or make answers which were irrelevant or incompetent admissible." [37]

To permit, therefore, the deposition of the party whose examination has been taken to be marked in evidence in its entirety over the objection of the party who has taken the examination would deprive the latter of his right to object to each question and answer and would constitute error. If the objection was taken solely on the ground that the party examined was in court such objection would not be sufficient.[38]

Assuming the plaintiff should take the examination of the defendant for the purpose of obtaining proof deemed necessary and material in the prosecution of the action and does not use the deposition on the trial for any purpose, may the attorney for the defendant use such deposition as part of the defendant's case and without calling the defendant? It is contended that such procedure is proper and in substantiation of such contention the following cases are of interest:

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[37] 80 App. Div. 20, 22, 80 N. Y. Supp. 184, 185 (1st Dep't 1903).
[38] Murphy v. Casella, 263 App. Div. 1001, 33 N. Y. S. 2d 451 (2d Dep't 1942).

Berdell v. Berdell,[39] *Luce v. Knowlton*,[40] In re *Green's Estate*[41] and *Kaufman v. Abramson*.[42]

It is argued that Section 881 of the New York Code of Civil Procedure and the present Section 303 of the Civil Practice Act, containing the language: "A deposition may be read in evidence by either party, in the action, in or for which it is taken, at the trial thereof or upon an assessment of damages" permits such procedure.

In *Berdell v. Berdell* the court states:

> A party whose deposition has been taken before trial at the instance of an adverse party has the right if he desires it, to read such deposition in evidence on the trial in his own behalf . . . and hence he has a substantial right that it shall be legally taken so that he can use it.[43]

In *Luce v. Knowlton* is found the following language relating to the deposition of a witness:

> The plaintiff's counsel offered to read the deposition of William F. Frost, to which defendant's counsel objected "upon the ground that it is taken by the defendant's attorney and at the instance of the defendant, and is not binding," which objection was sustained and exception taken by plaintiff. . . .
>
> The refusal to allow the plaintiff to read the deposition of William F. Frost was error, for the testimony of a witness taken at the instance of one party to an action can be read on the trial by the other party.[44]

The opinion in the case last cited does not show whether at the time of trial, the deposition was taken pursuant to stipulation, whether the witness examined was dead, or out of the state, or at a greater distance than one hundred miles from the place where the court was sitting, or that by reason of insanity, sickness or other infirmity, or imprisonment, was unable to travel to and appear at the court, or could not be compelled to attend by subpoena[45] or whether a portion of the deposition had been previously read by the defendant.

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[39] 86 N. Y. 519 (1881).
[40] 15 N. Y. Supp. 825 (City Ct. 1891).
[41] 155 Misc. 641, 280 N. Y. Supp. 692 (Surr. Ct. 1935).
[42] 248 App. Div. 628, 288 N. Y. Supp. 305 (2d Dep't 1936).
[43] 86 N. Y. 519, 521 (1881).
[44] 15 N. Y. Supp. 825 (City Ct. 1891).
[45] See N. Y. CIV. PRAC. ACT § 304.

In re *Green's Estate* the surrogate stated:

> The motion of respondents to strike out the testimony read by petitioner from her own deposition taken by respondents as an adverse party before trial is denied. The right of either party to read from the deposition of a party theretofore taken is not defeated by the presence of the party so examined, though the presence of a witness theretofore would bar the use of his deposition, ...[46]

Nowhere in the opinion just cited is there any indication that the respondents had or had not read before the surrogate any portion of the deposition taken by the respondents of the petitioner, while in the *National Fire Ins Co. v. Shearman* case it is clearly indicated the plaintiff who had taken defendant's deposition on two occasions, read part of both depositions into evidence and the court therefor held the defendant was entitled to have anything further therein read that might be material to the issue, subject to objections as to its competency.

In *Kaufman v. Abramson* the Appellate Division, Second Department, stated:

> Refusal of the Court to permit appellant (defendant) to read in evidence at the trial its own testimony taken by the plaintiff on an examination before trial did not prejudice the appellant, or affect any of its substantial rights, particularly in view of the fact that the Court offered to allow the appellant an opportunity to produce the witness on the trial.[47]

The record on appeal discloses that the defendant sought to read in evidence the examination before trial or parts of that which was taken by the plaintiff. It was objected to by the attorney for the plaintiff on the ground that no proper foundation had been laid; that it was an examination taken by the plaintiff as to operation and control; that operation and control was conceded by the defendant during trial and hence the deposition was not used and therefore any answers read into the record would be self-serving declarations. The attorney for the defendant argued that it was a paper taken at plaintiff's request and is to be used

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[46] 155 Misc. 641, 650, 280 N. Y. Supp. 692, 702 (Surr. Ct. 1935).
[47] 248 App. Div. 628, 288 N. Y. Supp. 305 (2d Dep't 1936).

for any and all purposes on the trial and that Abramson was not produced because he had his testimony under oath.

The Court: I will have to sustain the objection as to the examination before trial. He has not referred to it in any way, shape or form. It is not in evidence.

The Court: I will give you an opportunity to bring Abramson and also the doctor.

Mr. McGee: I won't do it. I want to finish the case by one o'clock. I want to hear that fight tonight.

If the cases cited [48] are authority for the rule, that an adverse party whose deposition is taken because deemed necessary and material in the prosecution or defense of the action, may offer this deposition in evidence or read certain portions into evidence of such examination without testifying on the trial, even though the party taking the examination has used no portion of it, no one in a negligence case should ever take the examination of an adverse party except to prove ownership, operation or control.

From the cases it is evident a plaintiff may not cross-examine a defendant, a defendant may not cross-examine a plaintiff, when such examinations are held solely for the purpose of aiding the examining party to obtain facts deemed necessary and material in the defense or prosecution of the action. The evident purpose of Section 288 of the Civil Practice Act in so far as examination of an adverse party is concerned is to assist the party conducting the examination and not the party examined. If, on the examination before trial, the plaintiff may not cross-examine the defendant, and the examination contains answers well prepared, calculated to wreck the plaintiff's case, and the defendant may read such answers into the record of the trial, even though the plaintiff has used no portion of the deposition, such deposition becomes a sword in the hands of the defendant.

The party who conducted the examination would be bound by such answers and the party examined has had his testimony perpetuated. As a result, the party examined, by the use of his deposition thus read into the record, is in fact a witness in his own behalf without appearing on the trial

[48] Cases cited notes 40, 41, 42, 43 *supra.*

and the limitations stated in Section 304 of the Civil Practice Act as to witnesses become a nullity. The deposition, under such circumstances, is not used as that of an adverse party but in reality as the testimony of a witness for himself, getting into the record many self-serving declarations with no opportunity afforded to the party who had conducted the examination in any way to break down his statements and permits a fraud on the party who has conducted the examination.

In the writer's opinion, taking the intent, purpose and language of Section 288 of the Civil Practice Act as it applies to an adverse party and the language of Section 303 of the Civil Practice Act: "A deposition may be read in evidence by either party" the correct rule is: if the party who has taken the deposition or examination of an adverse party does not use the examination for any purpose during the trial, the party examined may not use such deposition or examination against the party who has conducted the examination.

It must be conceded that the party who conducted the examination before trial cannot be compelled on the trial to read into evidence any portion of it as part of his case, nor can he be compelled to offer any portion of the deposition in evidence deemed material and competent as contradicting the material testimony on the trial of the party previously examined. How curious it seems therefore that the party examined should be permitted to accomplish the same result by offering as part of his case the deposition taken and which deposition the party who conducted the examination has abandoned.

It should be kept in mind that the party who conducted the examination having selected from the deposition for use on the trial such portions as suited his purpose cannot be heard to object to the attorney for the party examined reading in his behalf any other material parts thereof.[49]

If the plaintiff takes an examination of the defendant for the purpose last above-stated and uses a portion of such

[49] National Fire Ins. Co. v. Shearman, 223 App. Div. 127, 227 N. Y. Supp. 522 (4th Dep't 1928); Schupp & Sons, Inc. v. Barnett, 210 App. Div. 546, 206 N. Y. Supp. 553 (3d Dep't 1924).

examination either as part of plaintiff's prima facie case or as part of his cross-examination of the defendant on the trial to show contrary statements made under oath, the attorney for the defendant may use any portion of the examination or deposition without calling the defendant as a witness on the trial. It can therefore be seen that care should be taken first by the examining party to see that no question is asked on the examination before trial which may give the party examined a chance to destroy the examining party's case, and second by the party to be examined or by his attorney to see that the party or witness to be examined has some idea as to what the examination is about.

The right to offer in evidence, or to read the deposition in evidence, of a party whose examination has been taken for the purpose of obtaining proof in aid of the moving party's prima facie case, is stated in an opinion of the Appellate Division, Second Department:

> If plaintiff's deposition was offered in evidence as substantive proof of defendant's defense or counterclaim, it was error to reject the offer on the ground that plaintiff was present in the courtroom, since the offer constituted an offer to read the deposition in evidence and the limitations of section 304 of the Civil Practice Act do not apply to a party to the action . . . . If it was intended to use the deposition for the purpose of impeachment only, it was error for the court to relegate defendant to an examination of the plaintiff as to statements contained in the deposition considered as orally made. The defendant was entitled to offer in evidence the deposition or such material and competent parts thereof as contradicted the material testimony of the plaintiff without examining the plaintiff with regard thereto or laying the foundation necessary to prove prior inconsistent oral statements.[50]

Some decisions have been quoted at length so that it will be unnecessary for the reader to refer to bound volumes in following the various points or arguments used. It is hoped that it is made clear that there can be no cross-examination of a party or an examination before trial by himself or by his attorney when the purpose of the examination is to obtain

[50] Murphy v. Casella, 263 App. Div. 1001, 33 N. Y. S. 2d 451 (2d Dep't 1942).

evidence deemed necessary or material to prove or assist in proving the moving party's prima facie case.

RIGHT TO AN EXAMINATION BEFORE TRIAL BEFORE A BILL OF PARTICULARS IS SERVED

There are several decisions in the appellate courts on this very important subject clearly stating when you have the right to obtain an examination before trial before a bill of particulars is served.

In the case of *Chittenden v. San Domingo,* Judge Ingraham writing for the Appellate Division in the First Department states:

> Therefore, where it distinctly appears that it is essential that the deposition of a witness not a party to the action is material and necessary to enable a party to furnish a bill of particulars which the court has ordered her to furnish, there are certainly special circumstances which render it proper that the party should have the right to take the deposition of a person either a party or who is not a party, so that he can comply with the order of the court and furnish particulars which the court has ordered as essential to the protection of the adverse party. If such power does not exist, or cannot be exercised, a case may well arise where the court by ordering a bill of particulars would interpose a bar to the enforcement of a perfectly valid claim and where no possible harm could come to the other side except that which arises from the enforcement of a valid claim against it.[51]

In *Hill v. Bloomingdale* the court clearly states:

> If the defendants insist upon the plaintiff furnishing specifications, they should at least afford him the means of ascertaining them which they possess, otherwise he will be precluded from giving evidence upon the trial of specific defects. Courts sit to accomplish justice, not to rule upon the points of a game of sharp tactics.

And again referring to a witness:

> It should be said that orders for the examination of a witness not a party and sought upon the ground of special circumstances should be sparingly granted and then only where it appears to be necessary to prevent a failure of justice.[52]

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[51] 132 App. Div. 169, 174, 116 N. Y. Supp. 829, 833 (1st Dep't 1909).
[52] 136 App. Div. 651, 652, 121 N. Y. Supp. 370, 371 (1st Dep't 1910).

The Appellate Division in the First Department in *Zecchini v. Mayer* clearly defines the office of a bill of particulars and the purpose of an examination before trial. The following quotation should be of interest:

The office of a bill of particulars is to limit the issue under the pleadings. The examination before trial is for the purpose of adducing evidence to be used upon the trial of the issues, except in those cases where it is specifically granted to enable the plaintiff to frame a pleading or to obtain information necessary to enable him to give a bill of particulars. The order for examination of the defendants herein was obtained after answer and before a bill of particulars had been ordered. Obviously, therefore, it was to procure the evidence of the defendants for use upon the trial. Until the bill of particulars has been served, the relevancy or materiality of the evidence to the issues cannot be determined.

The plaintiff certainly knows the date when and the place where and the persons through or by whom he claims the agreement sued upon was made, whether it was oral or in writing, and the names and addresses of the persons to whom he claims he introduced the defendants. If he is unable to state definitely the particulars required in the 4th item he can make the best statement possible and state his reasons for not giving greater detail. It is evident that some of the details are known to the defendant and not to the plaintiff and will be proper subject of the examination.[53]

It can be seen that it is the opinion of the courts that a plaintiff or a defendant should particularize his cause of action or defenses before undertaking to ascertain his opponent's testimony in an examination before trial as stated by Judge Lehman in *Reuben v. Kadison:*

Without in the slightest degree impugning the good faith of the plaintiff, I am of the opinion that the defendant should not be compelled to submit to an examination in which such information will be disclosed until the plaintiff has limited his claim by furnishing a bill of particulars of such matters as are within his own knowledge, and at the present time, there is no reason to believe that the plaintiff cannot furnish a considerable part of the details required under item 2.[54]

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[53] 195 App. Div. 423, 186 N. Y. Supp. 459 (1st Dep't 1921); *see* Weinberg v. Berkshire Ice Co., 196 App. Div. 947, 187 N. Y. Supp. 927 (2d Dep't 1921).

[54] Reuben v. Kadisan, 169 N. Y. L. J. 1182 (Sup. Ct. June 26, 1923).

The Appellate Division, Second Department, in *Parker-Lauer v. L. I. R. R.* states:

Under the facts of this case, since the record does not disclose that any application to examine the defendants before trial was pending, the direction that a bill of particulars be served within twenty days after the completion of an examination of defendants before trial was an improper exercise of the court's discretion.[55]

WILLIAM J. MORRIS, JR.

Justice, Municipal Court, City of New York.

[55] 263 App. Div. 955, 32 N. Y. S. 2d 737 (2d Dep't 1942).